

Current drought situation is worse than in 2005

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Some growers are trying to direct water toward higher-value crops like onions and potatoes at the expense of irrigating their hay, said Oviatt. "A lot of hard decisions are coming into play," he said.

The problem isn't limited to surface water, as groundwater levels are also depleted, he said.

Low soil moisture must be replenished with steady rains, as heavy but short-lived storms fail to fully penetrate the ground, Oviatt said.

"To build that back up, it will take significant and slow precipitation events," he said. Washington is facing a

similar scenario, as 80 percent of its streams and rivers are below normal or at historic low flows, said Dan Partridge, communications manager for the Washington Department of Ecology's water resources program.

The current situation is worse than in 2005, which was Washington's last statewide drought, he said.

The potential for significant streams to run dry is "most certainly a possibility," which raises concerns about fish passage and mortality, Partridge said.

In California, state wildlife managers have been conducting "rescues" in which they manually remove fish

from shallow pools and move them to better habitats, said Jeanine Jones, interstate resources manager for the California Department of Water Resources.

Recent rainstorms that flooded Southern California haven't provided much help in terms of irrigation, she said. "A lot of it ran off right away."

With stream flows "way low," farmers are expecting to idle roughly half a million of the state's nine million irrigated acres, said Jones.

Roughly 75 percent of the precipitation in California occurs between November and March, so any eventual reprieve from the drought

isn't likely to come soon, she said.

"We've got a long ways to go before we see any real activity on that front," she said.

Idaho is also dealing with low stream flows but farmers had anticipated even worse conditions earlier in the year, said Liz Cresto, hydrology section supervisor for the Idaho Water Resources Department.

Irrigators are worried about the low water carryover in reservoirs that will be available for 2016, but this year, spring rains delayed the need for stored water use, Cresto said.

"We've been able to stretch the season more," she said.



Dan Wheat/Capital Press

The Wenatchee River at Old Monitor Bridge on July 15 has less flow than normal for this time of year.

New water rule has already generated 11 lawsuits

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the statute as "waters of the United States, including the territorial seas." The act leaves it to the EPA and Corps of Engineers to define the term "waters of the United States."

Existing agency regulations, which were last codified in 1986, defined "waters of the United States" as traditional navigable waters, interstate waters and all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas and adjacent wetlands.

The agencies' new rule — which was published in the federal register on June 29 and becomes effective at the end of August — has already generated 11 lawsuits against EPA and the Corps from 28 states, agricultural organizations, other land-use industries and private landowners. And it has spurred legislation in both the U.S. House and Senate that would require the agencies to withdraw the rule and start over.

Vague and broad

The American Farm Bureau Federation recognizes the need for a regulation that lays out the rules of the road. Farmers need it for protection, and the agencies need it to administer the Clean Water Act, said Don Parrish, AFBF's senior director of regulatory relations.

"But this rule is tantamount to putting Braille on speed limit signs," he said.

The new rule sets up water users and landowners for agency "I gotchas," he said.

"They're stacking the deck and holding the trump card, putting the public at a disadvantage and putting farmers and ranchers at a disadvantage," he said.

The overriding problem is "how vaguely broad the rule is and how extremely narrow the exclusions are, and all (the exclusions) are qualified. Everything is going to have to go through the agencies," he said.

Making the regulation vague was EPA's theme, despite the agency's stated intention of defining and clarifying which waters are protected, he said.

The rule adds another element to navigable waters, making categorical changes to "tributaries" and "adjacency," he said.

Of particular concern is EPA's new definition of a tributary — a water feature with bed, banks and an ordinary high water mark and flow downstream. Rainwater draining out of a farm field would create such conditions, he said. "Damn near every field we farm is going to have a feature like that," he said.



Carol Ryan Dumas/Capital Press

Twin Falls Canal Co. Manager Brian Olmstead stands next a headgate and looks out over the Lowline Canal. In his view, a new rule addressing water of the U.S. leaves farmers, ranchers and water resource managers wide open to litigation.

EPA has repeatedly stated that nothing is going to change for farmers and ranchers and the rule won't create any additional issues for agriculture, but the Corps has already determined such features on farmland constitute waters of the U.S., he said.

"It categorically changes everything. It makes a huge difference," he said.

In addition, the agencies expanded the definition of a tributary from the physical presence of bed, banks and an ordinary high water mark to "indicators" of those components, he said.

"That's crazy. This is what we're fighting over... 'indicators' of water," he said.

The rule excludes as tributaries erosion features, including gullies, rills and other ephemeral — short-lived — features but only if they don't exhibit bed, banks and an ordinary high water mark, he said.

"The agencies are talking out of both sides of their mouth. They crafted exclusions in a way to look like they're giving a lot, but they're not," he said.

At the basis of the rule's exclusions are the terms "water" and "dry land," yet the agencies failed to clearly define either one, leaving extremely broad definitions of both, he said.

Lack of these definitions "technically and effectively gives the agencies the discretion to regulate where and when on the landscape they want to or it's going to effectively give the courts the opportunity to implement this



Courtesy of American Farm Bureau Federation

Example of corps determined bed, bank and ordinary high water mark.

rule to the detriment of farmers and ranchers," Parrish said.

EPA assurances

The final rule provides more certainty and detail on what waters are protected and what waters are not protected, EPA Office of Water Deputy Assistant Administrator Ken Kopocis said in an interview with Capital Press.

The rule does not expand jurisdiction, maintains exemptions for normal farming, ranching and forestry practices and adds new exclusions that now carry the weight of law, he said.

The definition of tributary has not been expanded and contains the same features used by the agencies today to make that determination, but it is now codified in the rule, he said.

It has to have physical features "you can see, feel and touch." In EPA's experience "farmers know what are tributaries," he said.

EPA listened to concerns and clarified exemptions for ditches, changing the rule to focus more on streams and

If the agencies' preamble is to be believed and EPA can be trusted to administer the rule correctly, a lot of irrigation canals and drains are exempted, he said.

The new rule exempts ditches with ephemeral flows that are not a relocated tributary or excavated in a tributary and ditches with intermittent flows that are not a relocated tributary, excavated in a tributary or drain wetlands. It also exempts ditches that do not flow, either directly or through another water, into traditional navigable waters.

That should exempt a significant number of ditches, compared with EPA Region 10 (Alaska and the Pacific Northwest), which now considers all ditches and canals waters of the U.S., he said.

The association argued that all irrigation delivery and drainage conveyances be exempt as they were never included in the Clean Water Act, but EPA didn't go that far to exclude all constructed waters. It did, however, recognize a lot of those ditches with exemptions and will hopefully rein in Region 10 regulation, he said.

"There's cause for optimism, but there's still going to be some interpretation. It's going to be important for the regulated community to assert those defenses and remind EPA these exemptions exist," he said.

"I'm guessing EPA is not going to do it for us. We'll have to be proactive and vigilant," he said.

Advocacy needed

EPA did spend a lot of time trying to address the ditch issue, and a lot of ditches will be exempt if the rule is to be believed, said Norm Semanko, executive director of Idaho Water Users Association.

better clarified, the rule as a whole is still unbalanced, asserting too much jurisdiction beyond what was intended in the Clean Water Act, he said.

"I've heard nothing good about the rule from the regulated community except the attempt to clarify which ditches are exempt. The proof is all these lawsuits," he said.

Overreach

The biggest problem is the definition of "significant nexus," Olmstead, the Twin Falls Canal Co. manager, said.

Under the new rule, the term significant nexus means "that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a navigable water.

That could be applied to everything that runs downhill, any place in the West. And if environmentalists sue, a judge in a metropolitan courtroom many miles away will decide whether exemptions apply, Olmstead said.

"The language really opens the door for lawsuits," he said. Return irrigation flows could be considered a significant nexus, preventing the canal company from controlling aquatic moss, for example. The definition could encompass potholes, irrigated pastures, overflow from a canal spill, he said.

The new rule states for waters determined to have a significant nexus, they are a water of the U.S. if a portion is located within the 100-year floodplain of a jurisdictional water or within 4,000 feet of the high tide line or ordinary high water mark.

All waters adjacent to a jurisdictional water would also be covered if they are within 100 feet of the ordinary high water mark of a protected water; within the 100 year floodplain and within 1,500 feet of the ordinary high water mark; or within 1,500 feet of the high tide line.

According to EPA and the Corps, significant nexus and adjacent waters would not apply to excluded waters.

But the overriding question is whether the ag exemptions will hold up when officials are interpreting them, Olmstead said.

Sakuma lawsuit grew from unusual circumstances

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"It's going to be low-hanging fruit," she said. "It's not going to be hard to prove that workers weren't paid for rest breaks because industry-wide, they weren't."

Seattle lawyer Marc Cote, who represented Sakuma workers in the class-action lawsuit, said the ruling will affect thousands of workers, but questioned whether it will inspire a wave of back-

pay claims.

The Sakuma lawsuit grew from unusual circumstances related to a campaign to organize workers, he said. Most farmworkers won't be able to find advocates, he said.

"I think migrant farmworkers face a lot of barriers to getting access to justice," Cote said.

Washington State Labor & Industries spokesman Matthew Erlich said the department will send out no-

tices to employees about the ruling.

In an amicus curiae brief filed with the court before the ruling, Wixson and Wenatchee lawyer Kristin Ferrera asked that justices bar retroactive claims. They argued that farmers were following guidance from government agencies and that paying back wages could devastate growers.

Wixson and Ferrera filed the brief on behalf of the Washington State Tree Fruit

Association, Washington Growers League and Washington Farm Labor Association.

Cote argued that the court was merely interpreting, not changing, what the law had been all along and that retroactive claims should be allowed.

The court further ruled that rest break pay must be calculated based on how much the worker would have earned in 10 minutes of picking.

Sakuma through a public relations firm issued a statement lauding its current pay system.

"Today's ruling acknowledges that we are doing things right," CEO Danny Weeden said in a written statement.

The Washington Farm Bureau emailed an alert about the decision. "The ruling will likely have drastic repercussions throughout all of labor-intensive agriculture in Washington," according to the organization.



Don Jenkins/Capital Press file

Sakuma Bros. Farms grows, processes and trucks its fruit from its operations in Burlington, Wash., in Skagit County. The Washington Supreme Court has ruled that farmworkers paid on a piece-rate basis should also be paid for rest breaks.